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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES P. LEHNERT, *et alia*,

Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et alia*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE PUBLIC SERVICE RESEARCH COUNCIL, IN SUPPORT OF PETITIONERS

EDWIN VIEIRA, JR.
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

Counsel of Record for Amicus Curiae
Public Service Research Council

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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BRIEF *AMICUS CURIAE* OF THE PUBLIC SERVICE RESEARCH COUNCIL, IN SUPPORT OF PETITIONERS

INTRODUCTION

Pursuant to Rule 37.2 of the Rules of this Court, the Public Service Research Council submits this brief *amicus curiae*, in support of petitioners. Both petitioners and respondents have consented to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The Public Service Research Council is this nation's largest independent, nonprofit citizens' organization

concerned with public-sector unionism and the influence of public-sector unions on governmental institutions, policies, and operations. The Council widely distributes the results of its research and studies on public-sector unionism to the general public, newspapers, radio and television stations, the Congress, various governmental units throughout the United States, and other interested persons. The Council also engages in wide-ranging public education, legislative action, assistance to local citizens' groups, and legal challenges to the abuses of public-sector unionism.

More specifically, the Council has participated as *amicus curiae* in numerous cases before this Court, including *City of Madison, Joint School District No. 8* v. *WERC*, No. 75-946 (October Term, 1975); *Perry Education Association* v. *Perry Local Educators' Association*, No. 81-896 (October Term 1981); *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, No. 82-799 (October Term, 1982); and *Champion* v. *Deukmejian*, No. 84-1010 (October Term, 1984).

The Council is concerned with the instant case because, unless overruled here, the decision of the majority of the Court of Appeals will extend the power of public-sector unions acting as the statutory "exclusive representatives" of nonunion employees far beyond the merely *economic* realm of collective bargaining over the terms and conditions of those individuals' employment, by licensing such unions to compel nonunion employees to subsidize both

* union activism in the purely *political* arenas of legislation and electoral campaigns; and
* strikes and potentially myriad other union activities unquestionably *illegal* under State law.

In as much as petitioners have naturally focussed on the numerous and particular *details* of the case as to Ferris State College raised in the "Questions Presented" in their petition, they have not sufficiently emphasized the erroneous *conception* of exclusive representation adopted by the Court of Appeals' majority, and the grave significance that the majority's error (if generally followed) will have throughout public-sector employment nationwide. In its brief, the Council hopes to provide this Court with such a broad perspective on what the majority of the Court of Appeals has done, so as to render pellucidly clear the pressing need for issuance of a writ of certiorari here.

SUMMARY OF THE ARGUMENT

By licensing unions acting as the exclusive representatives of nonunion employees to collect "agency fees" from those employees *both* for otherwise lawful political and ideological activities that are nevertheless *not "integral"* to the process of statutory collective bargaining *and* for plainly *illegal* activities that are outside of that process by definition, the majority-decision of the Court of Appeals has, in effect, attempted to reverse the central holdings of *Abood* v. *Detroit Board of Education*[1] and *Ellis* v. *Railway Clerks*.[2] Absent this Court's intervention by writ of certiorari, the majority's decision will foster confusion, if not chaos, in the evolving jurisprudence of public-sector "agency-fee" arrangements.

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[1] 431 U.S. 209 (1977).

[2] 466 U.S. 435 (1984).

ARGUMENT

I. The Court of Appeals' majority has improperly extended the authority of unions acting as the exclusive representatives of nonunion public employees beyond the circumscribed *economic* realm of statutory collective bargaining into the potentially limitless *political* arena of legislative lobbying and electoral campaigns.

In *Abood*,[3] this Court upheld the constitutionality of the particular Michigan *public*-sector "agency-shop" scheme at issue here on the authority of two *private*-sector decisions, *Hanson*[4] and *Street*,[5] and *only* "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes".[6] This reliance on *private*-sector cases, restriction of the exclusive representative's authority to the narrowly defined field of "collective bargaining", and refusal to find that "a public employee has a weightier First Amendment interest than a private employee in not being compelled to contribute to the costs of exclusive union representation"[7] all demonstrate that *Abood* understood public-sector exclusive representation as no less essentially *economic* in character than its private-sector counterpart—at least with respect to the forced "agency"-

[3] *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

[4] *Railway Employes' Department* v. *Hanson*, 351 U.S. 225 (1956).

[5] *Machinists* v. *Street*, 367 U.S. 740 (1961).

[6] Abood, 431 U.S. at 232.

[7] *Id.* at 229.

relationship between the union and such nonunion employees as petitioners here.[8]

Moreover, *Abood* specifically held that the First Amendment absolutely precludes an exclusive representative "from requiring any [nonunion employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher", insofar as those "ideological activities [are] unrelated to collective bargaining".[9] Thus, *Abood* clearly established that the authority of an exclusive representative *vis-a-vis* nonunion public-sector employees is not essentially, primarily, or even generally but only *contingently and incidentally* political and ideological: namely, to the limited extent that the union's "ideological activities" are "germane to its [statutory] duties as collective-bargaining representative".[10]

Abood did recognize in *dicta* that

> [t]he process of establishing a written collective-bargaining agreement prescribing the terms and

[8] *See id.* at 230: "The very real differences between exclusive-agency collective bargaining in the public and private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees" than of private employees.

[9] *Compare id.* at 235-36 (opinion of Stewart, J.) *with id.* at 254 (opinion of Powell, J.),

[10] *Id.* at 235 (footnote omitted). *Abood's* discriminating use of the adjective "germane" highlights the teaching that an exclusive representative's authority to compel nonunion employees to subsidize its "ideological" activities through "agency-shop" fees derives from the "close relationship" of those activities to its statutory duties. *See Black's Law Dictionary* (rev. 4th ed. 1968), at 816.

> conditions of employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process[11]

—thereby leaving a small and largely theoretical scope for union "lobbying" that would be permissibly chargeable to nonunion employees, *not* because the union has a protean roving commission to posture as their general *political* "agent" in its capacity as exclusive representative, but because the "lobbying" is in fact and law "integral" to the fundamentally *economic* process of *fixing* and *implementing* specific terms and conditions of employment for those employees.[12]

The decision of the majority of the Court of Appeals eviscerates the careful limitations *Abood* prescribed and, in an operation worthy of Dr. Frankenstein, transmogrifies a union acting as the exclusive representative of nonunion employees from an *economic* "agent" that may engage solely in "ideological" activities functionally "integral" to the performance of its economic tasks into a *political* "guardian" that may run amok in legislative lobbying and electoral campaigns wholly distinct from the process of collective bargaining itself. This result is reflected most repellingly in the majority's rationalization that

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[11] 431 U.S. at 236.

[12] Again, the *Abood* Court's use of the adjective "integral" is significant in teaching that any political and ideological activity claimed as chargeable would have to be "necessary to make a whole" of the collective-bargaining process. *See Webster's New Twentieth Century Dictionary* (2d ed. unabrgd. 1970), at 953.

> [i]t cannot be disputed that governmental budget and appropriations decisions directly affect the terms and conditions of employment for public employees. To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other "political" arenas.[13]

Nothing in this apology supports the majority's conclusion.

First, that some, or perhaps even all, "governmental budget and appropriations decisions" may "directly affect the terms and conditions of employment of public employees" begs the question—which is, "Are those decisions 'an integral part of the bargaining process', in the sense of being necessary for the implementation of a particular collective-bargaining agreement?" Obviously, the amount *A* that a governmental unit may be allocated to fund a negotiated employment-agreement depends to some, and perhaps even to a large, degree on the amounts *B*, *C*, *D*, . . ., *Z* that may be required to fund all other governmental programs—which amounts, in turn, depend on the overall availability of funds through taxation or borrowing, the priorities for allocation of those funds, and numerous other controversial issues of public policy. According to what the Court of Appeals' majority claims "cannot be disputed", the union's statutory authorization to negotiate the amount *A* empowers it to compel nonunion employees to subsidize its legislative activism with respect to *every other govern-*

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[13] 881 F.2d at 1392.

mental expenditure that could possibly compete with A, with respect to *every means by which the government could raise revenue that might be allocated to* A, and with respect to *the prioritization of every governmental program that might require the expenditure of funds*: in short, to lobby on almost anything and everything!

Second, the Court of Appeals' majority itself admits that, in such lobbying, the "unions [are] necessarily concern[ing] themselves *not only with negotiations at the bargaining table*"—that is, the unions' activism is *not* "an integral part of the bargaining process" at all. The majority's gratuitous assumption is that the status of exclusive representative broadly licenses a union to "advanc[e its] members' interests" through whatever means it deems necessary: The legitimacy of the means is to be tested by whether implementation of that means can advance the "members' interests". The correct analysis under *Abood*, however, gauges the propriety of any means the union desires to employ by that means' "integral" relationship *vel non* to the statutorily defined process of collective bargaining, irrespective of the efficacy of that process in achieving all of the "members' interests".[14]

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[14] The Court of Appeals' facile reference to "*members*' interests" is misleading, in as much as this case involves the interests of *non*members of the union who are largely antagonistic to the organization's goals. Moreover, the assumption that the union's hierarchy actually represents the *political* interests of even the organization's voluntary members is highly questionable. *E.g.*, *Federal Election Comm'n* v. *National Education Ass'n*, 457 F. Supp. 1102, 1108 (D.D.C. 1978):

> The NEA suggests that because their members voluntarily choose to join, it is likely they also would choose to contribute to its political activities.
>
> Although this argument has some merit, it is not without its weaknesses. First of all, coincidence of viewpoints between a member and a labor organization's employment objectives does not necessarily translate into coincidence of political viewpoints. Secondly, when a member joins, he likely assumes that he will have to pay his fair share of the cost of the union's normal labor activities. It does not follow that he knows he will also be supporting the union's extracurricular activities in the political arena unless he expressly objects.

Third, the Court of Appeals' majority's license for unions to compel the payment of "agency fees" for use in "legislative and other 'political' arenas" is limitless. Already, the majority has broadly approved lobbying the legislature *and* "electoral campaigns, including the contesting of ballot issues and the passing of millages".[15] According to its reasoning, union intervention in the internal affairs of political parties, participation at political conventions, and support for political candidates for public office should also (and especially) be chargeable to nonunion employees, in as much as lobbying unsympathetic legislators is no way for sensible unions "[t]o represent their members effectively".

In sum, if the Court of Appeals' majority-decision stands, at least in the Sixth Circuit public-sector exclusive representatives will hereafter be suffered to impose themselves on nonunion employees, not only as those employees' economic "agents" for the narrow purposes of statutory collective bargaining, but also as the employees' *political controllers* with respect to every issue of public policy that could conceivably "affect [their] terms and conditions of employment". This is neither the arrangement *Abood*

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[15] 881 F.2d at 1392.

countenanced nor one in which this Court could ever acquiesce, if the First Amendment really does protect individual self-determination in the realm of political opinion.[16] And for this reason alone, a writ of certiorari should be issued.

II. The Court of Appeals' majority has wildly licensed unions acting as the exclusive representatives of nonunion public employees to compel those employees to subsidize the unions' *illegal* activities.

In *Ellis*, this Court defined "the test" for a permissible "agency fee" as

> whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the [statutory] duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.[17]

Self-evidently, an activity *illegal* under State law cannot conceivably be within the statutory "duties of an exclusive representative", and therefore cannot conceivably give rise to an expense chargeable under an "agency-fee" scheme. Indeed, if inherent in the performance of "the duties of an exclusive representative" is the representative's compliance with all laws that define its proper ambit of operations, engaging in *illegal* activity necessarily amounts to the very *opposite* of "performing th[ose] duties".

Not to the Court of Appeals' majority, however, which deemed "union expenditures made for publicizing, preparing for and threatening a strike that

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[16] *See West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 630-31 (1943).

[17] 466 U.S. at 448.

would be *illegal* under Michigan law" to be "within the range of *reasonable* bargaining tools available to a public sector union"![18] The absurdity of this equation of lawlessness with reasonableness is self-evident.

So, too, should be the majority's implicit logic. The majority gave "considerable deference" to the District Court's finding of fact that preparing for an illegal strike is a "reasonable bargaining too[l]".[19] But what is a "reasonable *bargaining* too[l]" ultimately depends, as a matter of law, on what is the controlling definition of "collective bargaining". One would presume that the sources of this definition would be: *first*, the State statute authorizing such bargaining (including those provisions limiting or outlawing various activities, such as strikes); and *second*, the State and United States Constitutions. Here, the Court of Appeals' majority has held that "collective bargaining" embraces patently and undeniably *illegal* activities. Thus, by the perverse reasoning of the majority, in Michigan *"collective bargaining" is not defined by law at all*, in the sense of being intelligibly limited by reference to the Constitution, State statutes, court decisions, and so on. Rather, "collective bargaining" subsumes whatever tactics—legal *or illegal*—the union, in its unilateral discretion, finds to be sharp-edged weapons for intimidating the employer.[20]

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[18] 881 F.2d at 1393-94 (emphasis supplied).

[19] *Id.* at 1394.

[20] *See Lehnert* v. *Ferris Faculty Association-MEA-NEA*, 634 F. Supp. 1306, 1312-13 (W.D. Mich. 1986). The Court of Appeals' majority emphasizes that "the union did not actually engage in an illegal strike". 881 F.2d at 1393. But if the union *never intended* to call a strike, *and the employer was fully aware of*

In sum, if the Court of Appeals' majority-decision stands, at least in the Sixth Circuit public-sector exclusive representatives will hereafter be suffered to posture, not only as those employees' political controllers (in direct violation of *Abood*), but also as a species of workplace *Mafiosi* licensed to extort payments from such employees for purely illegal purposes. And for this reason alone, a writ of certiorari should be issued.

CONCLUSION

The Court of Appeals' majority-decision is more than a fatally flawed application of *Abood* and *Ellis*. By allowing unions to collect "agency fees" *both* for otherwise lawful political and ideological activities that are nevertheless *not "integral"* to the process of statutory collective bargaining *and* for plainly *illegal* activities that are outside that process by definition, the majority has, in effect, attempted to *reverse* the central holdings of those cases outright.

Absent this Court's timely intervention, intellectual and legal chaos in the policing of "agency-fee" schemes throughout the country will predictably ensue.

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this pacific stance, the cost of preparations for a act that would never occur could hardly be considered a "reasonable" charge against nonunion employees. What kind of a "bargaining too[l]" is a hollow threat to strike that everyone knows is a mere charade?

This Court can gauge for itself the magnitude of the potential problem by noting that teacher-strikes in Michigan in 1989-1990 involved some 2,046 teachers and 40,742 students. *The Government Union Critique*, Vol. 11, No. 18 (21 July 1989), at 4.

For these reasons, the petition should be granted.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Independent Hill, Virginia 22111
(703) 791-6780

Counsel of Record for Amicus Curiae
Public Service Research Council